

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ATTORNEY GENERAL JIM HOOD,
THE STATE OF MISSISSIPPI,
EX REL. THE STATE OF MISSISSIPPI

PLAINTIFF

VS.

CIVIL NO. 3:15CV317HTW-LRA

FRED CANNON, ET AL.

DEFENDANTS

MOTION HEARING

BEFORE THE HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE
AUGUST 17TH, 2015
JACKSON, MISSISSIPPI

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR

501 East Court Street, Suite 2.500
Jackson, Mississippi 39201
(601) 608-4187

APPEARANCES

FOR THE PLAINTIFF:

MR. WILLIAM M. QUIN II
MR. WILLIAM B. BARDWELL

FOR DEFENDANTS CANNON, ARTZER, DITSCH AND HACSKAYLO:

MR. WILLIAM C. BRABEC
MS. ALEXANDRA C. BOUDREAU
MR. BENJAMIN B. MORGAN

FOR DEFENDANTS ALEXANDER, ROACH AND WHITLOCK:

MR. JAMES P. STREETMAN III
MR. PAUL E. COGGINS
MS. LEAH NICHOLS LEDFORD

FOR DEFENDANTS VK SERVICES, LLC; KHOSLA VENTURES, LLC; KHOSLA
VENTURES ASSOCIATES II; KHOSLA VENTURES ASSOCIATES II, LLC;
KHOSLA VENTURES III, LP; KHOSLA VENTURES ASSOCIATES III, LLC;
SAMIR KAUL; DENNIS CUNEO; VINOD KHOSLA; KFT TRUST; VINOD
KHOSLA, TRUSTEE; AND VNK MANAGEMENT, LLC.:

MR. JAMES DOUGLAS MINOR, JR.

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1 THE COURT: Morning.

2 (ALL RESPONDED "GOOD MORNING")

3 (PAUSE)

4 THE COURT: Again, good morning. I had asked for the
5 submission of some supplemental authority on an issue. Let's
6 see. I'll start with the defendants and let them discuss this
7 supplemental authority that has been submitted.

8 MR. BRABEC: Yes, your Honor. If the court will
9 recall, at the last hearing the issue concerning the ability of
10 the State to get a jury trial was discussed; and none of us up
11 here being bankruptcy lawyers, couldn't give the court a good
12 answer about how the right to trial by jury would interplay
13 with the bankruptcy court. And so we had requested the court
14 leave to supplement on that particular issue, which we did.

15 Your Honor, I think it's very clear now what the law
16 is on jury trials in bankruptcy court. First of all, as
17 Mr. Quin recognized last time, you can have a jury trial by
18 agreement of the parties if both parties consent and you have
19 the jury trial actually in the bankruptcy court.

20 However, if one or both of the parties do not consent
21 to a jury trial, the parties have the right to a jury trial in
22 district court where the bankruptcy court is pending. And the
23 magis- -- I mean the bankruptcy court would serve as a
24 magistrate to handle all the pretrial matters, and then the
25 district judge would handle the actual jury trial.

1 The case law is pretty clear. The State submitted a
2 response to our very short brief on that issue. And in that
3 58-page response they couldn't come up with a single case that
4 held that the issue of -- the right to a trial by jury would
5 trump any other factor, much less the presumption -- the home
6 court presumption that has been recognized.

7 All of the cases that are the more recent cases since
8 it's been clearly established as to the right to a trial by
9 jury in the district court have really downplayed the issue of
10 a jury trial as being an important factor in transfer,
11 basically, because you're going to get a jury trial one way or
12 the other. And so it's not an important factor, and certainly
13 it is not the determinative factor. And so as we submitted
14 last week, it's only one of many factors; and we believe that
15 it's heavily outweighed by the home court presumption.

16 Your Honor, I know that in their reply the State went
17 into a number of other issues that the court didn't request
18 briefing on. And while I'm prepared to address those, I really
19 think -- I understood the issue that the court wanted to be
20 heard was the jury trial issue, and we believe that's been well
21 settled. So unless the court wants us to address those other
22 issues --

23 THE COURT: While you're up there, why don't you go
24 ahead and do that.

25 MR. BRABEC: All right, your Honor. Under 28 U.S.C.

1 1412 there can be two reasons for transfer. One is in the
2 interest of justice and the other is for the convenience of the
3 parties. And it's an either-or situation. There have been six
4 recognized factors under the interest of justice.

5 One is sufficiency and economics of the state
6 administration; two is the home court presumption; three is
7 judicial economy; four is fairness in the ability to receive a
8 fair trial of which the right to jury trial fall -- is a
9 subpart of that; and the state's interest in having local
10 controversies decided within its borders; and the plaintiff's
11 choice of forum.

12 No one is controlling, although the home court
13 presumption has been given heavy weight both in this district
14 and nationally. The majority -- the clear majority rule is
15 that the home court presumption will apply unless it's
16 outweighed by the other factors.

17 Judge Lee recognize in *Everett v. Friedman* that it
18 should be for the bankruptcy court to make the determination of
19 whether a case may or should remain in federal court. And,
20 likewise, Judge Jordan in the *Atlas v. Chrysler* case applied
21 the home court presumption as well and said that it was for the
22 bankruptcy to decide the issue of remand. We believe that this
23 home court presumption outweighs all of the other factors by a
24 long shot, but I will go through the other factors on the
25 interest of justice as well.

1 The efficiency and economics of the state
2 administration: That was discussed in detail at the first
3 hearing, the interrelationship between the other bankruptcy
4 motions and the claims here.

5 Your Honor, Mr. Quin made the argument before that the
6 State was not a party to the bankruptcy and, therefore, it
7 shouldn't apply. But I believe that if the court will look at
8 the submission that was recently made by the State, the court
9 will see that, one -- Exhibit 1 is the memorandum of
10 understanding, which is the -- which was submitted as a part of
11 the State's claim in bankruptcy. That is the memorandum of
12 understanding which is the subject of this lawsuit.

13 Also the State of Mississippi specifically filed a
14 claim -- it was not just MDA. It was titled "MDA, State of
15 Mississippi" in their proof of claim. And that's reflected in,
16 your Honor -- I believe in footnote number 2 on Exhibit 2,
17 which was the adversary proceeding between KiOR, Inc., and both
18 MDA and the State of Mississippi. So the State of Mississippi
19 has been actively involved in the bankruptcy.

20 The second factor under interest of justice is the
21 home court presumption, and I think that factor is controlling
22 here. The third factor is judicial economy. And, your Honor,
23 as the court has seen, there's not going to be -- at best this
24 is a neutral factor for the State. And we would submit that it
25 weighs heavily in support of transfer as well because the

1 bankruptcy court's already familiar with all these issues and
2 it can get this thing resolved much faster.

3 Now, I know the State submitted some affidavits
4 talking about the ability to get a trial. And if the court
5 looks at those affidavits, realize that -- that we wouldn't be
6 able to get a trial for two or three years in this case because
7 the dates that they got were for one-week trials. And the last
8 affidavit that was submitted, the supplemental affidavit,
9 indicated that there was only one period in 2016 where the
10 circuit court had a two-week period open.

11 And that's assuming you can get through with discovery
12 and all of that, which is going to take much longer in state
13 court than it is federal court because we don't have -- we've
14 got a lot of out-of-state witnesses. We're going to have to go
15 through the cumbersome procedure of getting letters rogatory
16 issued and getting process issued out of various state courts
17 to get these third parties deposed, which you don't have to do
18 in federal court, and of which the State has already availed
19 itself in the bankruptcy court.

20 The fourth factor is fairness and ability to receive a
21 fair trial. The State does not contend that they can't get a
22 fair trial in bankruptcy court or in the district of Delaware.
23 And so that is a neutral factor, particularly since it's clear
24 that they could have a jury trial up there just like they could
25 have a jury trial down here.

1 The fifth factor is the State's interest in having
2 local controversies decided within its border. And while
3 ostensibly that would seem to weigh in favor of the State, the
4 court needs to remember that for nearly eight months the State
5 actively pursued discovery and these claims through the
6 bankruptcy procedures and took extensive discovery on these
7 particular claims.

8 For example, your Honor, this right here is just one
9 deposition that was taken of my client Fred Cannon by Mr. Quin.
10 And the deposition dealt almost exclusively with issues that
11 are -- have bearing in this case. So this --

12 THE COURT: How many pages is that deposition?

13 MR. BRABEC: Your Honor, it is 300- -- 325 pages. So,
14 your Honor, we don't believe that the fifth factor weighs
15 heavily in favor of a transfer given the fact that the State
16 has already been comfortable in pursuing and moving within the
17 bankruptcy court and has availed itself of the benefits of the
18 bankruptcy court.

19 And then finally is the plaintiff's choice of forum,
20 which is a factor but not a strong factor. It's outweighed by
21 the home court presumption. And also when you have the issue
22 of forum shopping, which we contend applies here, the State --
23 there's no doubt that the State could have filed this in the
24 bankruptcy court and chose not to.

25 So we would submit that under the six factors in the

1 interest of justice that this case should be transferred where
2 the bankruptcy court knows the issues and it's much easier
3 for -- for them to weigh the effects that it's going to have on
4 the bankruptcy court than it is for us Mississippi lawyers who
5 haven't been involved in that bankruptcy.

6 Your Honor, the other method of transfer is for the
7 convenience of the parties. And there are four factors that
8 can apply. The first is the ease of access to sources of
9 proof. And we would submit that the bankruptcy court with its
10 nationwide service and ability to use the federal rules would
11 weigh in favor of that.

12 The State has already taken advantage of that, as I've
13 said numerous times, with respect to the other factors. But
14 that's an important -- an important factor under the
15 convenience of the parties portion of 28 U.S.C. 1412.

16 The location of the debtor's assets, books and
17 records: That's somewhat of a neutral factor here because the
18 debtor's actually located in Texas. And so it really doesn't
19 weigh one way or the other.

20 A very important factor, though, is the third factor,
21 the availability of compulsory process. Your Honor, the State
22 wants this thing in circuit court in Mississippi. If the state
23 rules apply, the availability of compulsory process is just
24 going to be just very -- much more difficult to get depositions
25 of the parties and third-party witnesses.

1 The fourth and final factor under the convenience of
2 the parties is the location of the parties and witnesses. All
3 of -- all of the defendants, all 19 of them, are nonresident
4 defendants. KiOR is a nonresident. The State and its
5 employees are residents, but many of the -- the people who were
6 involved in this do not reside in Mississippi.

7 Since the time of this transaction, some of the key
8 MDA people have left the state of Mississippi, such as Mr. Gray
9 Swoope who is -- I believe he's in Florida or he may be in
10 another state now. But he had -- he did transfer to Florida
11 and took a new job over there at one point in time.

12 We've got -- we've got the governor who, as the court
13 knows, spends most of his time in the Washington, D.C., area.
14 He will be an important witness in this case. There are many
15 many witnesses who will -- who are not parties here that are
16 out of state. In fact, there are very few in-state witnesses
17 that will apply -- that will have to testify in the case.

18 Your Honor, applying all these factors, it's clear
19 that there's nothing strong enough to overcome this home court
20 presumption that's been recognized by a majority of the courts
21 and by a majority of the judges in this particular district.
22 And for that reason, your Honor, we would submit that the
23 action be transferred to the bankruptcy court for the District
24 of Delaware. Thank you.

25 THE COURT: All right. Thank you. Now, are there any

1 other arguments on that side?

2 MR. MINOR: Your Honor, I anticipate making an attempt
3 to distinguish some of the cases that are cited in the State's
4 brief. I can do that after they argue or I can do it now.
5 It's whatever the court's pleasure is.

6 THE COURT: Why don't we wait afterwards.

7 MR. MINOR: Okay.

8 THE COURT: All right. Now to the State.

9 MR. STREETMAN: No, your Honor, we have nothing.

10 THE COURT: All right. Thank you.

11 MR. QUIN: Before I begin my presentation, I feel like
12 it's appropriate to simply ask the court if there are any
13 questions that are weighing on your mind before we begin.

14 THE COURT: Go ahead. Make your argument.

15 MR. QUIN: As an initial matter, when we left court at
16 our last hearing, I understood the issue to be the impact of
17 the State's jury trial demand on the motion to transfer. We
18 discussed in our last hearing issues of the Seventh Amendment.
19 We discussed whether bankruptcy courts could or should preside
20 over jury trials. And it was in the context of that discussion
21 that we brought our brief, and we addressed four issues.

22 I see little need to belabor the first three of them
23 considering how it appears that they are conceded to. But for
24 the interest of completeness, number one, the Seventh Amendment
25 guarantees the right to the State for a jury trial. The Ninth

1 and Tenth Circuit Courts of Appeal have so held, as has the
2 Eastern District of Louisiana.

3 Secondly, the bankruptcy court does not absent the
4 consent of the State have the authority to impanel a jury.
5 That too is conceded, and that's statutory and constitutional
6 authority.

7 Number three, is the bankruptcy court's inability to
8 conduct a jury trial an appropriate factor for this court to
9 consider within the context of the motion to transfer? And the
10 answer to that is very clearly yes. But to the extent that our
11 opponents have said that we cited no case that says that, that
12 is demonstrably wrong simply by a reading of the briefs.

13 I could list the cases. I have the brief here in
14 front of me, but I know that the court does as well, and I
15 don't want to waste the court's time unless you want me to read
16 the citations into the record. We've listed several cases, and
17 there are many others that we didn't list in the interest of
18 economy.

19 Fourthly -- and that is the primary issue that I
20 intend to address here now because I feel like it's the real
21 question before the court. Under what circumstances does the
22 jury trial demand of the State weigh in favor of transfer
23 versus those other circumstances in which a jury trial demand
24 may weigh against or in favor of the transfer?

25 So what we did in our brief -- and we -- I hope that

1 it's helpful for the court -- is analyze every single case
2 cited by the defendants as well as the cases cited by us so
3 that the court could accumulate them and then begin to see the
4 factors, the actual factual matters that come into play in the
5 determination on a motion to transfer.

6 Now, before we get into that, what I do believe is
7 important, essential actually for the court to understand are
8 two things because they guide the weighing of factors as to
9 whether you're going to place a checkmark in the defendants'
10 column or a checkmark in the plaintiff's.

11 Number one, the burden of proof. The burden of proof
12 here is that the defendants as the movants must come forward
13 with a preponderance of evidence, not argument, evidence, to
14 illustrate that any particular factor weighs in their favor.

15 Number two, any factor that comes out as neutral
16 weighs against transfer. We cited for the court the *Caremark*
17 case which itself cites the *Enron* case for that principle.
18 There is no case law cited by them. And, to wit, I will -- and
19 to that end I will tell the court there is no such case law.
20 Neutral factors weigh against transfer.

21 Moving to the test itself, we've heard much ado about
22 the presumption, the home court presumption, in our earlier
23 hearing and here. In fact, today, to paraphrase, I believe
24 what I heard is that it weighs so heavily in this case in favor
25 of transfer that the other factors become less important.

1 To that end, we have cited in our briefs and have
2 brought for the court three cases. The *Capmark* case, the
3 *Mirant Corporation* case, and the *Northwest Airlines Corporation*
4 case, each of which stand for the following preposition --
5 preposition -- proposition. When a chapter 11 plan has already
6 been confirmed, the presumption is destroyed or substantially
7 weakened.

8 The number one distinguishing point between every case
9 that you have seen the defendant cite above all other is that
10 every single one of those cases involved estates that were
11 continuing to be administered. There was no plan confirmed.
12 In fact, they cited only one case in the entirety of their
13 briefing in which there was a confirmed chapter 11 plan.

14 And in that case it was a legal malpractice case in
15 which the debtor claims its lawyers committed malpractice in
16 drafting the plan. And the court said because of the
17 bankruptcy court's familiarity with what happened in the
18 drafting of the plan and the activity of those lawyers before
19 that court and given that that is the very circumstance at
20 issue in that case, it's transferred.

21 So before I submit these cases, I want to show you
22 the -- or argue for you the two points that weigh heavily in
23 all these cases. Number one, is there an open plan? Here
24 there isn't. Number two, is the subject matter of the suit at
25 hand, this suit, the State's fraud suit, the attorney general's

1 fraud suit, does it overlap with or is it duplicative of the
2 subject matter of any claim in the bankruptcy against the
3 debtor or, to the extent that it may apply, any adversary
4 proceedings that have previously been brought or transferred to
5 the bankruptcy court?

6 That's a common sense test because you don't want to
7 have issues of res judicata or collateral estoppel or just for
8 judicial economy sake two different judges weighing the same
9 facts, at least during pretrial proceedings. That's the
10 circumstance that exists.

11 Neither one of those applies in this case. We
12 submitted for the court as an exhibit the stipulation. The
13 reason why KiOR brought an adversary proceeding against the MDA
14 was an effort to create a degree of relatedness. It was forum
15 manipulation of the worst kind.

16 And because we as the MDA, not the state attorney
17 general who was not a party to that proceeding, brought a
18 contractual claim rooted in the MOU, the memorandum of
19 understanding, which we made as an exhibit for the court, we
20 stipulated that we would not contest the dischargeability of
21 the MDA's claim in the bankruptcy, rendering it, as it always
22 had been, contractual in nature.

23 The stipulation itself shows that there was no
24 adjudication of the merits and that this state court case
25 wasn't impacted in any way. So when you see that we have a

1 confirmed plan, you have issues that have never -- factual or
2 legal, never been and never will be considered by the
3 bankruptcy court, the cases in which the defendants cite simply
4 don't apply. If I may approach, I'll submit the authority.

5 (DOCUMENT TENDERED TO THE COURT)

6 MR. QUIN: Before moving to the test itself, there is
7 a fourth factor in addition to the confirmation of the plan,
8 that the case doesn't involve activities that occurred in the
9 bankruptcy court, or that there's no issue of operative fact
10 before the court presently.

11 The fourth factor that distinguishes that case from
12 the authority the defendants cited you, Delaware has no
13 connection to any facts in this case. None of the operative
14 activities occurred here. None of the defendants' actual
15 residence is in Delaware. The only connection Delaware could
16 even possibly claim to this is that there are a handful of
17 LLC's that are Delaware corporations. That's it. Nothing else
18 happened there.

19 Contrast that with Mississippi. This is a fraud case.
20 The misrepresentations, the reliance on the misrepresentations,
21 the causation and the damages all occurred in Mississippi. One
22 of the core facts in this case, the construction and brief
23 operation of the facility, the only commercial-scale facility
24 that KiOR ever had, was in Columbus.

25 Mississippi has a substantial connection to this, not

1 to mention that the measure of damages here are the public
2 funds that were wrongfully tendered as a result of the fraud,
3 state funds. Yet another connection for Mississippi. No
4 connection for Delaware.

5 Moving to the transfer factors themselves, the first
6 one is the economic and the efficient administration of the
7 bankruptcy estate. It is this factor in which the presumption
8 that the defendants speak of apply.

9 Well, here the estate has been administered, and there
10 is no presumption as the authority we just submitted to the
11 court instructs. So the first factor weighs against transfer.

12 Secondly, judicial economy, whether the interest of
13 judicial economy would be served by the transfer. We've
14 discussed the first subpoint under that. The stipulation that
15 we entered into is evidence in and of itself that the
16 bankruptcy court has never and will never consider the issues
17 in this case. To the contrary, as the stipulation shows, it --
18 it itself -- it says that it is not an adjudication of the
19 merits and the merits had never been and never would be
20 considered.

21 Secondly, attempting to bring or bringing the
22 adversary proceeding in the bankruptcy court between KiOR, who
23 was not a defendant in our suit, a suit between nondebtors, as
24 a means of having the issues and facts of this case adjudicated
25 in the bankruptcy court where we cannot obtain a jury trial is

1 evidence in and of itself of forum manipulation.

2 The second component of that is the removal and
3 attempt to transfer this case that doesn't meet any of the
4 factors, not a single one. Thirdly, the bankruptcy judge's
5 inability to preside over a jury trial.

6 Now, it is true that the bankruptcy judge under the
7 procedures that exist in our federal courts could preside over
8 pretrial and then refer the case to a district court for trial,
9 but that's not the issue. The issue is whether under the
10 particular facts and circumstances in this case it should.

11 If we're talking about judicial economy, judicial
12 economy is destroyed in the sense that the very judge that they
13 claim has all of the knowledge and afforded that knowledge was
14 to preside over pretrial would not be presiding over trial.
15 You'd have a brand-new judge altogether. So whatever
16 institutional or built-in sort of knowledge that he obtained
17 during pretrial or that they claim he may have now vanishes at
18 trial. That does not weigh in favor of judicial economy.

19 Fourthly, the bankruptcy judge's inability to render a
20 binding decision during pretrial on the various motions that
21 are going to come forward means that you have an additional
22 layer of judicial review. Right? We go to the district court
23 on an additional layer of appeal that doesn't exist in Hinds
24 County Circuit Court. You've got one judge. You argue your
25 motion. You move on. That is less economical.

1 Finally, this case does not present issues of
2 res judicata, collateral estoppel, and there are no overlapping
3 or duplicative issues of facts of law with regard to the issues
4 in this case versus the issues that have ever been or ever will
5 be before the bankruptcy court.

6 The next factor is whether the parties would be able
7 to receive a fair trial in each of the possible venues. What
8 I'd like to focus on in this factor is the burden of proof.
9 Certainly, we're not here claiming that a district court in
10 Delaware is fundamentally unfair to us. Nor are we here
11 claiming that a bankruptcy judge, Judge Sontchi in Delaware, is
12 fundamentally unfair to the state attorney general. But that's
13 not the question.

14 See, it's their burden to show that Delaware is more
15 fair, because we get to choose our forum. And as the case law
16 we've cited is if the factor's neutral, then it weighs in favor
17 of denying transfer, not granting it.

18 The next factor is whether either forum has an
19 interest in having the controversy decided within its borders.
20 Certainly, a legitimate argument cannot be made that Delaware
21 has a greater interest in having this case decided there than
22 Mississippi does in deciding this case here. That factor
23 weighs against transfer.

24 The next factor, the enforceability of any judgment
25 would be affected by a transfer. An enforceable judgment can

1 be rendered in Hinds County or in the Delaware district court,
2 rendering the factor neutral, and neutral factors weigh against
3 transfer.

4 Finally, should the plaintiff's original choice of
5 forum be disturbed. We cited a United States Supreme Court
6 case, quoted from it, in fact, in our brief, that stands for
7 the following proposition. In cases of unique local interest,
8 such as defrauding the State of Mississippi of tens of millions
9 of dollars, that a local jury, that the citizens of the state,
10 have a very strong interest in having a jury within that state
11 preside over the case so that it is heard within its borders
12 and they just don't have to read about it in the newspapers but
13 they can, in fact, see it firsthand. This sixth factor weighs
14 heavily in favor of the State.

15 So then if you review the factors, the first factor
16 weighs against transfer because there is no presumption in this
17 case due to the confirmation of the plan. Judicial economy
18 weighs in favor of the State precisely because no pretrial
19 decision would have to be -- would be binding, adding an
20 additional layer of review, because whatever -- whatever
21 knowledge that the bankruptcy judge gained during pretrial
22 matters would be lost at trial, and the other factors that we
23 discussed.

24 Whether we'd be able to receive a fair trial: We
25 don't contend that Delaware would not be a fair forum. What we

1 do contend is that it's no more fair; and that being neutral,
2 that weighs in favor of denying transfer.

3 Reviewing the fourth factor again, whether Mississippi
4 or Delaware has a greater interest of having the controversy
5 decided within its borders, there's no point to belabor that.
6 Certainly Mississippi has a greater interest than Delaware.
7 The enforceability of any judgment affected, it's neutral
8 because the judgments of both courts would be enforceable if
9 you're assuming bankruptcy court is not the trial court.

10 And the plaintiff's original choice of forum, that
11 certainly weighs in favor of Mississippi as well because a
12 Mississippi jury and the citizens of this state have a much
13 greater interest in having a trial here than does those of
14 Delaware.

15 A second approach that this court can consider -- and
16 it was not addressed by the defendants in their brief, but it
17 is a legitimate one. It, in fact, occurred in a Louisiana case
18 that we cited in ours -- is if abstention -- and I don't intend
19 to belabor the abstention argument unless the court wants to
20 hear the abstention argument again.

21 If the abstention factors, enough of them -- and
22 enough of them have been defined by the Fifth Circuit. It's
23 just three out of four of mandatory abstention factors, and we
24 clearly meet that here -- or enough of the permissive
25 abstention -- and the Fifth Circuit said even one of those is

1 enough -- but we meet virtually, as we set forth in our prior
2 argument, all of those as well -- if the abstention factors
3 weigh in favor of this court just remanding, then another
4 approach is to just remand and moot the transfer motion
5 altogether.

6 Now, the Louisiana court did just that. A case was
7 removed, it was sent -- it was -- a motion to transfer was
8 filed seeking to have it transferred to the home court
9 bankruptcy. The Louisiana court found permissive abstention
10 and sent it back.

11 Another case in that regard that I think the court
12 would find particularly obstruction -- instructive is a
13 Mississippi case. It's *In re: Trimjoist Corporation*. And the
14 cite is 2013 Bankr., Bankruptcy, LEXIS 3080. It's a July 30,
15 2013, decision from the Bankruptcy Court of the Northern
16 District.

17 In that case the court was confronted with -- and,
18 again, I'm not going to belabor the factors unless the court
19 would like me to or to get even further in depth into the
20 decision, but the issue before the court was whether mandatory
21 abstention or permissive abstention should apply. And as
22 argued by the defendants and we've rebutted it, three of the
23 four factors applied and there was a question over whether the
24 fourth one did.

25 And what the bankruptcy court did is it decided to

1 simply moot the permiss- -- mandatory abstention argument and
2 to permissively abstain because, in fact, three of the four
3 factors had been met as well as other permissive abstention
4 factors.

5 We would argue that's precisely what the court should
6 do here. It should abstain, it should remand, it should moot
7 the transfer motion because that is the most economical and
8 efficient handling of the case.

9 Finally, I asked Will Bardwell, my associate, to do a
10 very pointed research project for me in advance of our last
11 hearing. And the reason why I bring this up on the abstention
12 factors is because it also is going to weigh with regard to the
13 transfer motion as well. So I'll start with the transfer
14 motion.

15 I would ask the court to ask the defendants this
16 question. Show you a single case in which there is a confirmed
17 plan of reorganization and a dispute between nondebtors and in
18 which there is no claim pending in the bankruptcy court arising
19 from the same common nucleus of operative facts in which
20 transfer was granted.

21 We looked at all Feds across the whole country and we
22 couldn't find one. But what we did find is transfer that met
23 the circumstances that I outlined earlier, none of which come
24 to play here.

25 With regard to abstention, I asked Mr. Bardwell on

1 permissive abstention to conduct a search in which you had
2 purely or predominantly state law issues, non-core claims, as
3 we do here admittedly, that fall in the "related to" bankruptcy
4 jurisdiction of the court involving confirmed plans. He looked
5 within the Fifth Circuit, and he found the following cases in
6 which abstention was granted.

7 The *Firefighters' Retirement System* case, 2014 U.S.
8 Dist. LEXIS 98721. *Towing and Recovery Professionals*, 2012
9 U.S. Dist. LEXIS 148414. *Petroleum Engineers*, 2011 U.S. Dist.
10 LEXIS 152090. *Patterson*, 337 B.R. 82. *JT Thorpe Company*, 2003
11 U.S. Dist. LEXIS 26016. And *Wrt Creditors*, 75 F.Supp.2d 596.

12 In all those cases the courts abstained and remanded.
13 No case that met the actual circumstances of this case,
14 non-core claims, state law, confirmed plan, no case denied
15 remand. No case denied permissive abstention.

16 Mandatory abstention, we did a similar search and the
17 cases are extensive. *Bates and Rogers Construction*
18 *Corporation*, 97 B.R. 905. *In re Chiodo*, 88 B.R. 780. *McKee*,
19 1999 U.S. Dist. LEXIS 8735. *City of Harvard*, 1990 U.S. Dist.
20 LEXIS 19136. *Raven II Holdings*, 367 B.R. 786. *Fitzgeralds*
21 *Sugar Creek*, 261 B.R. 1. *Personette*, 204 B.R. 764. These are
22 all cases that applied mandatory abstention that were filed in
23 state court initially after the filing of a bankruptcy petition
24 and then were removed and remanded.

25 Now, respectfully, certainly the court can dig into

1 the mandatory abstention factors and reach a finding if it so
2 chooses. What I would argue is that the more expeditious and
3 perhaps best approach is to simply apply permissive abstention,
4 not dig into whether the requirement as to whether a suit must
5 be filed before there's a bankruptcy petition or not, just as
6 the Northern District Bankruptcy Court did, and to apply
7 mandatory -- apply permissive abstention and not dig into the
8 mandatory abstention factors.

9 Moving to the convenience of the parties' factors and
10 the final thing that I'll discuss now before the court's
11 questions, the second component of the 1412 analysis is whether
12 transfer would be in favor of convenience of the parties. And
13 the four factors which we agree as listed by counsel are the
14 ease of access to sources of proof.

15 As we discussed in our earlier hearing, the sources of
16 proof in this case are depositions and documents, as they are
17 in most cases. Documents are produced digitally, as they have
18 been -- some of them have been in the bankruptcy on different
19 matters. And that those same documents may also be evidence in
20 support of our claims in this case is great, but the point is
21 that they're digitally produced. So the ease of access to
22 sources of proof is neutral with respect to document
23 production.

24 With respect to depositions, no defendant is a
25 resident of Delaware. Whether this case proceeds in Hinds

1 County circuit court or this court or Delaware, in either of
2 the courts, travel to witnesses in California or Texas is going
3 to be necessary. So at worst that factor is neutral and
4 neutral favors weigh against transfer.

5 Number two, the location of assets. I won't belabor
6 that point because counsel has admitted that that factor too is
7 neutral. Neutral factors weigh against transfer.

8 Availability of compulsory process. The two points
9 that I would make is, number one, party of defendants -- you
10 don't need compulsory process for parties. So it's moot as to
11 them. As to third-party witnesses, as I am sure the court is
12 well aware, letters rogatory are used all the time.

13 Number four, location of parties and witnesses, again,
14 none of the defendants are Delaware residents, neither
15 corporate nor individual. And as far as nonparty witnesses, a
16 special point was made with regard to Governor Barbour and Gray
17 Swoope, the former executive director of the MDA. I simply
18 would note this, as the court may be aware from *The*
19 *Clarion-Ledger* article, both of them are partners in Butler,
20 Snow, about two blocks from my office, in an economic
21 development venture now.

22 While Mr. Swoope may travel to Florida and
23 Governor Barbour certainly may travel to D.C., I am quite
24 comfortable that we'll be able to obtain, if not voluntary
25 appearances at depositions, certainly, compulsory process over

1 them.

2 And that concludes my presentation. If the court has
3 any questions, as I'm here, I'd be happy to answer them.

4 THE COURT: No. Thank you much.

5 MR. QUIN: Thank you.

6 THE COURT: Court will take a ten-minute recess.

7 (RECESS)

8 THE COURT: You may be seated. Now, then, rebuttal.

9 MR. BRABEC: Your Honor, I'm going to take these kind
10 of in reverse order. But I was a little taken aback by
11 Mr. Quin's statement during argument that we had argued the
12 abstention issues, because that was not our understanding. It
13 was our understanding from the beginning that the court wanted
14 to hear arguments on the -- on the transfer motion only. And
15 so I would like the record clear that we have not argued the
16 abstention issues. While they may have been mentioned, they
17 certainly were not argued.

18 But I think that one thing that the court needs to
19 remember -- and it's a key point -- when we consider how the
20 claims overlap, it's not the law that has to overlap. It's the
21 facts. And the bankruptcy court has been involved with the
22 facts from the beginning. As Mr. Quin said a week ago
23 Thursday, there have been hundreds of thousands of documents
24 that were produced in the bankruptcy, that there have been --
25 there have been over 12 depositions taken in the bankruptcy,

1 all at the request of the State and MDA.

2 The State and MDA have been actively involved in the
3 bankruptcy from the beginning and -- but now they don't want
4 it -- want the case transferred because they want to go to
5 their chosen forum, hopefully, as they see it, in circuit court
6 in Hinds County.

7 Your Honor, I want to make something very clear. In
8 their response, there is not a single case that states the
9 issue of whether a jury trial would be available is the
10 controlling factor. It may be one of many factors but not the
11 controlling factor.

12 Now, the presumption, your Honor, is applicable.
13 This -- the home court presumption is exactly what it is, a
14 presumption. We meet the burden of proof with the presumption,
15 but we do -- did far beyond that.

16 Now, Mr. Quin stated that we had the burden to prove
17 that the Delaware court is more fair than a Mississippi court.
18 Your Honor, with all due respect, that's just not true.
19 Nowhere in any of these cases is there a statement that says
20 that the moving party has the burden that it would -- to show
21 that the transferee court would be fairer than the transferor
22 court.

23 And, your Honor, I wanted to talk about some of these
24 cases that were relied upon by the MDA.

25 THE COURT: So what's your view about this fairness

1 issue then?

2 MR. BRABEC: The issue of fairness?

3 THE COURT: When you make a distinction between the
4 transferee court and transferor court, then how do you say that
5 factor weighs out?

6 MR. BRABEC: I believe -- we believe that it's a
7 neutral factor, but I disagree with Mr. Quin. He says that a
8 neutral factor is an against factor. No. A neutral factor is
9 a neutral factor.

10 The court is not required to make a finding on each
11 factor. Only one factor can apply and overweigh the other
12 factors. So it's not whether you win five of six or whether
13 you win, you know, three and a half of six, it's which is the
14 strongest. And we believe that a combination of the home court
15 presumption with the interrelatedness of the -- and the effect
16 on the bankruptcy that is most important.

17 Now, your Honor, the *Capmark* case is one that was
18 cited by the plaintiffs. And the *Capmark* case is not a case
19 that was based on whether a jury trial was requested. That was
20 a factor. But what was -- that case was decided on the
21 judicial economy factor, which is one of the six factors I
22 discussed.

23 But the thing that was so important about this
24 particular case, your Honor, that distinguishes it from our
25 case is this. The state court suit in *Capmark* was filed not

1 only after the debtor had its plan confirmed, but it was filed
2 after the debtor had emerged from bankruptcy completely.
3 That's completely different from what we have here.

4 What we've got is a plan that's been approved, but
5 we've got the bankruptcy court specifically reserving
6 jurisdiction to hear disputes. So the *Capmark* case is
7 completely distinguishable on that point in and of itself.

8 But also, your Honor, *Capmark* makes a good point in
9 favor of transfer here. At page ten of the *Capmark* decision,
10 the court stated, "Where a bankruptcy proceeding involves a,
11 quote, substantial learning curve, transfer pursuant to
12 28 U.S.C. 1412 is appropriate."

13 Your Honor, we submit that this case would involve a
14 substantial learning curve. As Mr. Quin stated during our last
15 hearing, the -- the various motions and positions that have
16 been taken by the various parties, by the debtor, by the State,
17 by the MDA, are so interrelated with this claim. The only
18 difference between this claim and what was going on in the
19 bankruptcy court is the fact that they sued the investors and
20 the officers and directors of the company instead of the
21 company itself, but all of the facts are the same.

22 They benefited from extensive discovery on that issue,
23 got hundreds of thousands of documents, got numerous
24 depositions, including the one that I showed the court earlier,
25 through bankruptcy. And now they're saying it's just not fair

1 for them to have to be in bankruptcy court. Well, your Honor,
2 I disagree and I think the case law also disagrees with them.

3 THE COURT: So you disagree with opposite counsel's
4 assessment that where a factor is neutral that that is a factor
5 then that weighs against transfer.

6 MR. BRABEC: I disagree. Your Honor, neutral, while
7 it doesn't support a transfer, it doesn't weigh against a fact.
8 If we had no other proof and everything was neutral, then I
9 would agree that we have not met our burden.

10 But we have met our burden here on several of the
11 factors, not the least of which is the home court presumption,
12 which, as the court knows, a presumption is a presumption which
13 meets the burden -- which is going to meet the burden of proof.
14 We don't have to put on any specific proof to meet that. And
15 we have that presumption. We also have the very first factor
16 and a number of the other factors as I went through before.

17 Now, if it's neutral, it doesn't help the transfer;
18 but it doesn't mean that you've got to prove every one of the
19 factors in order to get a transfer. The court just weighs
20 which factors in the court's opinion is most -- would be most
21 important.

22 THE COURT: I believe he cited a case in support of
23 that.

24 MR. BRABEC: Well, your Honor, I disagree. We've got
25 factors -- there may have been some courts that have held that.

1 I am unaware of that. And I would have to -- I'm not going
2 to -- I'm not going to say that they don't have cases from some
3 district, but I know there's no controlling law that says that
4 in the Fifth Circuit. I know that for a fact. There may be
5 something in New York or there may be something in -- somewhere
6 else. But, your Honor, that's why you have -- you have one in
7 favor, you have one against and you have one that's neutral.

8 Now, the case law is very clear that you don't have to
9 prove all six elements of the interest of justice in order to
10 get it transferred. The preponderance of the evidence of the
11 factors and, you know, what -- you could only -- you can prove
12 it with one factor, you can prove it with two factors, you can
13 prove it with all six factors, but you don't have to prove it
14 with all six factors.

15 THE COURT: Now, this presumption upon which you
16 rely --

17 MR. BRABEC: Yes, your Honor.

18 THE COURT: -- how is it compromised, if at all, by
19 the disappearance of an estate?

20 MR. BRABEC: Pardon me, your Honor?

21 THE COURT: How is it affected by the disappearance of
22 an estate?

23 MR. BRABEC: Well, the estate hasn't disappeared, your
24 Honor.

25 THE COURT: So you disagree with the other side.

1 MR. BRABEC: We disagree that the -- I mean, the plan
2 has been approved, yes.

3 THE COURT: Okay.

4 MR. BRABEC: The estate is still there.

5 THE COURT: Well, then --

6 MR. BRABEC: And until the -- until the debtor comes
7 out -- works out of bankruptcy, it's still there. And we -- as
8 I stated a few moments ago, the *Capmark* decision, your Honor,
9 showed that it was when they emerged from bankruptcy they've
10 lost that presumption. We understand that. They haven't
11 emerged from bankruptcy yet.

12 THE COURT: Okay. Go ahead with your argument.

13 MR. BRABEC: All right. Now, your Honor, we're not
14 going to argue the issues on remand. The court didn't want
15 those -- that argument at that time. It's not necessary for
16 the court to consider that issue until the court finds on
17 whether it's -- the case is going to be transferred or not.
18 And it's an appropriate consideration for the transferee court
19 if that's what the court finds; and if not, it's for the court
20 to decide at a later time.

21 But we don't think that the issue of abstention has
22 any effect whatsoever on whether there's a transfer. Now,
23 certainly, some courts have conflated the two, but that's not
24 the proper procedure. The proper procedure is to make a
25 decision on transfer and then -- then consider the issue of

1 remand.

2 But I do want to make it clear, again, we have not
3 argued on remand. We believe we've got meritorious arguments
4 against remand. But because the court has told us to deal with
5 the transfer issue first, that's what we've done.

6 Thank you, your Honor.

7 THE COURT: All right. Thank you. Mr. Minor, you
8 said that you wanted an opportunity to distinguish some of the
9 cases.

10 MR. MINOR: Yes, your Honor, and make just one -- a
11 couple of other points in response to the questions that your
12 Honor asked or issues that came up in the prior argument.

13 First of all, your Honor, I want to address this whole
14 issue of the plan being over with, that the bankruptcy is over.
15 I don't recall Mr. Quin's exact words, but he certainly tried
16 to suggest to the court that we're now here in a situation
17 where the bankruptcy proceeding has ceased to be an ongoing and
18 viable proceeding.

19 And as you may recall from my argument before you last
20 time, I referenced the actual language of the order. And I
21 think it's important in response to the State's position to
22 point out the scope of jurisdiction that the bankruptcy judge
23 has expressly stated it has retained following the confirmation
24 of the plan.

25 Your Honor, that court stated that it shall retain

1 jurisdiction over all matters arising out of and related to the
2 chapter 11 case and the plan to the fullest extent permitted by
3 law including, without limitation, jurisdiction to allow,
4 disallow, determine, liquidate, classify, estimate or establish
5 priority -- I'm going to summarize a little bit, your Honor --
6 grant or deny any applications for allowance of professional
7 fee claims, resolve any matters related to the assumption --
8 assumption and assignment and rejection of any executory
9 contract or unexpired lease, ensure that distributions to
10 holders of allowed claims are accomplished pursuant to the
11 provisions of the plan.

12 And perhaps most importantly, your Honor, the
13 bankruptcy court retains jurisdiction to decide or resolve any
14 motions, adversary proceedings, contested or litigated matters
15 and any other matters, included all vested causes of action and
16 objections or estimations to claims or equity interests and
17 grant or deny any applications involving the debtor that may be
18 pending on the effective date or that pursuant to the plan may
19 be instituted by the liquidating trustee or any other person or
20 entity after the effective date, provided, however, that the
21 liquidating trustee and the liquidating trust shall reserve the
22 right to prosecute the vested causes of action.

23 So, your Honor, the plan has been confirmed. That's a
24 true statement. However, this bankruptcy proceeding is not
25 closed. The bankruptcy court has retained jurisdiction, and

1 the State has conceded that there is "related to" jurisdiction
2 in this particular matter.

3 Your Honor, just to step back, a lot of the argument
4 that you've heard has been very technical and there are a lot
5 of factors. And there are all good lawyers in this room; and
6 we all know when you have a four-prong or six-prong or
7 eight-prong test, you can spend enough time on Westlaw and you
8 can find out a case that comes out one way or the other in
9 favor of the position that you're trying to take at that time.
10 And you can certainly -- by aggregating a lot of cases, you can
11 frequently, rather, make the argument that your position is
12 supported by case law.

13 But, your Honor, I think it's important to step back
14 here and just sort of make this much more simple. The State
15 went to the bankruptcy proceeding and they tried to get money.
16 When they couldn't get money there, now they're trying to get
17 money here. There is a relationship between the bankruptcy
18 proceeding and this action that's that simple.

19 And the argument to you today is this is so completely
20 different, this is so totally different, it has nothing to do
21 with it. And, your Honor, that's simply not true. It was
22 evidenced by the visual aid Mr. Brabec brought here.

23 And I want to point out to the court that there are
24 four other defendants in this lawsuit who have been deposed. I
25 don't know if the depositions are as thick as that, but that I

1 believe is some indication that there was an extensive
2 examination of the parties in this matter in the course of the
3 bankruptcy proceeding.

4 Your Honor, the State's argument attempts to gloss
5 over the extent to which they were involved in that proceeding.
6 As I said to you before, they have submitted a claim in that
7 proceeding. They have been extensively involved in that
8 proceeding. They filed over 60 documents in that proceeding.

9 None of these cases that they're citing to you in
10 their brief -- and I have all four of them right here in front
11 of me -- none of them involve an entity that has submitted a
12 claim in the bankruptcy proceeding that they are resisting --
13 to which they're resisting transfer of the case. There is a
14 much more intimate relationship between the State and the
15 bankruptcy proceeding and this particular dispute than in any
16 of the four cases that they mention.

17 Your Honor, a lot of what they say is about remand.
18 And as Mr. Brabec said a few moments ago, to the extent those
19 are good arguments or bad arguments, the judge in Delaware will
20 be able to make that determination; and I'm not rising to
21 respond to those arguments. I believe that the State's
22 entitled to make those arguments. I, however, encourage the
23 court, as I suggested in my previous remarks, to allow the
24 court that has the more intimate knowledge of this dispute to
25 make that decision.

1 Your Honor, just I want to also point out for the
2 record in response to the State's attempts to put so much
3 distance between this dispute and that one, Mr. Brabec pointed
4 out that the MOU was submitted and filed in the bankruptcy
5 court. That certainly is a development that is not found in
6 any of these other cases. In this case the State filed a
7 motion to pursue a claim derivatively on behalf of the debtor,
8 they filed a motion to convert it to a chapter 7, and they
9 filed a motion objecting to the reorganization.

10 The reason why we believe, your Honor, that transfer
11 is appropriate is because there is a judge who since November
12 of last year has presided over the case in which the State's
13 filed 60 documents, has presided over the case in which
14 defendants have been examined at various hearings, has had
15 documents attaching deposition testimony submitted to the
16 court, heard witnesses.

17 It simply makes sense, your Honor. Despite you having
18 the resources to gain the information that the court has, it's
19 not necessary for you to do so. And we believe that the
20 transfer should be made to the court so that that court can
21 make that decision.

22 Your Honor, as I said a few moments ago when I was
23 talking about the cases that I wanted to distinguish,
24 Mr. Brabec mentioned the *Capmark* case. And I'm not going to
25 repeat what he said; but as he indicated, it's distinguishable.

1 Two of the other three cases that are referenced --
2 and, your Honor, I'm responding to the cases that they included
3 in their brief. I'm obviously not in a position to address
4 several of the authorities that they mentioned in their
5 argument. But they rely on four cases in opposition of
6 transfer. The *Capmark* case, as Mr. Brabec said, is
7 distinguishable and even has language in it with respect to the
8 substantial learning curve, which we believe affirms our
9 position.

10 The *Marrone* case, which is the second case. The
11 primary distinguishing characteristic there is -- it is the
12 reverse of what we have here. The bankruptcy proceeding was
13 filed after the lawsuit. In fact, the motion to transfer was
14 filed four years after the lawsuit was filed.

15 Well, your Honor, that very obviously presents a very
16 different situation. Here the bankruptcy proceeding was filed
17 first, and there it was filed afterwards. But not only that,
18 it was filed -- the motion to transfer was filed four years
19 after the state court action -- excuse me -- it was four and a
20 half years after the state court action, and then it was filed
21 four years after the bankruptcy action.

22 It's distinguishable because the bankruptcy was filed
23 afterwards. And we referenced that in our brief, and we
24 believe that that's an important factor for the reasons set
25 forth in our brief. That case also was distinguishable because

1 the court went out of its way to talk about how virtually all
2 of the documents and witnesses were in New York. And we
3 certainly don't have a situation where virtually all of the
4 documents or witnesses exist in any particular place, as
5 Mr. Brabec said earlier.

6 The third case that they reference, the *Cytodyn* case,
7 is clearly distinguishable because that case involved a motion
8 to transfer that was filed a week before trial. So the lawsuit
9 had been pending, trial's about to come, and then the litigants
10 decide that they want to try to go to bankruptcy court. In
11 that case the judge used the phrase "highly bad faith attempt"
12 in describing the filing of that motion to transfer.

13 We clearly don't have that situation here. Once
14 again, here the bankruptcy proceeding predated the filing of
15 the lawsuit. So both *Marrone* and *Cytodyn* chronologically are
16 inconsistent with the situation that we have here, and there's
17 certainly no evidence of any bad faith attempt. We couldn't
18 have in bad faith attempted to do that, your Honor, because the
19 bankruptcy proceeding was filed -- was filed before we knew
20 that the state court was going to file a proceeding and was
21 certainly filed before the proceeding was filed.

22 Lastly, your Honor, the *Luciano* case, the fourth of
23 the four cases that they relied on, is clearly distinguishable
24 because it involved a sexual harassment suit against the
25 officer of the company that was in a bankruptcy proceeding.

1 That is all the way to one end of the spectrum as far as having
2 a relationship to the bankruptcy proceeding.

3 We're all the way over here on the end of the State's
4 filed the claim there, the State has taken the agreement that
5 serves as the basis for the claim, this MOU they alleged to
6 have fraudulently been -- they were induced fraudulently into
7 signing. That document is a part of the record in the
8 bankruptcy proceeding. They've made a claim in the bankruptcy
9 proceeding, they've litigated in the bankruptcy proceeding,
10 they sought money in the bankruptcy proceeding, all on the
11 basis of the MOU which is attached to the complaint in this
12 particular proceeding.

13 So the notion that you, your Honor, should be making a
14 decision on remand as they're arguing when that -- this case
15 has been so extensively litigated and they have such
16 involvement in it and have sought to use it both for purposes
17 of obtaining money and also apparently for obtaining
18 information as based on the length of this particular
19 deposition, we believe that all of those factors are in clear
20 contrast to the four cases that they are relying on in their
21 brief and are certainly inconsistent with the particular facts
22 before the case in the -- before the court in this particular
23 case.

24 So, your Honor, for all these reasons, we believe that
25 the State certainly is entitled to have the motion to remand

1 heard. They're entitled to file it in the transferee court.
2 Upon transfer, they're entitled to make all of the same
3 arguments. We'll have the same burden in response to that.
4 And the fact that the case is going to be transferred is not
5 going to prejudice them in any way.

6 You asked for a brief on the jury trial issue. We
7 briefed it for your Honor. We showed that there's no prejudice
8 to them with respect to the jury trial because they will still
9 get one. So now we're here arguing about whether or not the
10 case should be remanded. And they're certainly not prejudiced
11 when they have the opportunity to make that argument before the
12 court that has most of the information about this particular
13 proceeding. Thank you, your Honor.

14 THE COURT: All right. Thank you. I know it's their
15 motion and they should get the last word; but inasmuch as
16 Mr. Minor has sought to distinguish some of your cases, I want
17 to hear your response to that.

18 MR. QUIN: The first point that Mr. Minor made with
19 respect -- was with respect to the jurisdiction retained in the
20 plan. That's the federal question jurisdiction, the
21 "related to" bankruptcy jurisdiction.

22 We've conceded that here, although we have
23 acknowledged -- and will say again as we did in our earlier
24 hearing -- that the connection is very, very tenuous in light
25 of the confirmation of the plan and the other things that we

1 have discussed. And that is the *Capmark* case.

2 The second point that was made with respect to the
3 *Capmark* case and both Mr. Minor and I believe Mr. Brabec
4 discussed is the suggestion that *Capmark* doesn't speak of
5 confirmation. It speaks of emergence from bankruptcy. The
6 court need look no further than the language of *Capmark* itself,
7 and I'll just read it.

8 "As a general matter, the district in which the
9 underlying bankruptcy case is pending is presumed to be the
10 appropriate district for hearing a determination of a
11 proceeding in bankruptcy. However, it must be noted that after
12 a plan has been confirmed by the bankruptcy court, any
13 presumption in favor of maintaining venue before the bankruptcy
14 court is substantially weakened."

15 It speaks of confirmation of the plan and then it
16 cites to the *Northwest Airlines Corporation* case, 384 B.R. 51,
17 and the *Mirant Corporation* case, 337 B.R. 107 at 124, and it
18 quotes from it. And the quote from it that the *Capmark* case
19 provided, open quote, Any such presumption in favor of
20 retaining venue of the bankruptcy case in this case has been
21 significantly weakened, if not entirely destroyed, by the
22 circumstance that this is now post-confirmation litigation.
23 The issue is confirmation. The plan has been confirmed.

24 With respect to the *Marrone* case, the reason why --
25 and more generally before I dig into the *Marrone* case, the

1 reason why we cited *Capmark*, *Marrone*, *Cytodyn*, and *Luciano*
2 varied case by case. What we were trying to do is collect for
3 the court cases in which certain factors in addition to the
4 jury trial demand tend to weigh along with that jury trial
5 demand in favor of denying transfer. So in each of these cases
6 you have a jury trial demand plus something else.

7 In *Capmark* it was the fact that there was no
8 presumption, contrary to the arguments of counsel here, plus
9 the jury trial demand, plus the fact that the bankruptcy court
10 had never considered any of the issues in the case in which
11 transfer was sought. There were no issues of collateral
12 estoppel, *res judicata*, and there were no issues of duplicative
13 or overlapping jurisdiction.

14 On *Capmark*, I was discussing with my counsel before
15 your Honor had come back into the courtroom that if I was
16 allowed a surrebuttal what would be my ten-second-or-less
17 argument and it is this. Perhaps the most important point for
18 the court at this stage to recall is the defendants as the
19 movants bear the burden of proof; and they must do that with
20 evidence, not with argument.

21 I hope it is not lost on the court that among the
22 counsel arguing, I'm the only one who was present in the
23 bankruptcy case. And I am telling you as an officer of this
24 court, aware of all of the penalties of perjury, the issues in
25 our case, the factual issues as well as legal ones, were not

1 ever before the bankruptcy court. And if the defendants claim
2 otherwise, it is as a matter of law impermissible for them to
3 try to meet their burden with argument by simply saying it's
4 the same. They must show it. And they haven't.

5 I can tell you again as an officer of this court, the
6 issues in the bankruptcy court were, number one, whether waiver
7 was ever going to be granted, whether nondebtors would be
8 allowed to have waivers of liability from the very liabilities
9 that are the sort in this suit. They dropped that claim.

10 After that it was whether there was -- the plan was
11 feasible and whether the Khosla parties should be allowed to
12 have preference claims. That was it. That's what was at issue
13 in that case. And if they want to claim otherwise, they have a
14 burden of proof. And there is no evidence, just as in *Capmark*.

15 Now, it's true that the -- that in the *Marrone* case
16 that the order of things are as Mr. Minor set them forth. But
17 the reason why transfer was denied wasn't because of the order
18 and the reason why we cited it wasn't because of the order. It
19 was because of other things that are unassailable in this case
20 as well.

21 Number one -- I'm reading from the *Marrone* case -- the
22 plaintiff's choice of forum is generally accorded more
23 deference when it is a resident of the forum state. That's
24 *Marrone* at page eight. We're in Mississippi. Obviously, the
25 attorney general is the state. Not a resident, but one would

1 think the interest is just the same or stronger. The
2 plaintiffs in *Marrone* were residents of New York, as the AG is
3 here of Mississippi.

4 The defendant's allegedly harmful conduct had an
5 effect on the plaintiffs in New York. The harmful conduct in
6 our suit had an effect on the AG and the State of Mississippi
7 within the State of Mississippi. The contract at issue in
8 *Marrone* was negotiated in New York. The MOU was negotiated and
9 executed by the -- Gray Swoope of the MDA in Mississippi.

10 Numerous witnesses and all of the documents upon which
11 the plaintiff relied were located in New York. That's true
12 here. As they've mentioned, we already have digitally produced
13 documents that were produced in the bankruptcy on other issues.
14 Here in Mississippi the digital production of documents will
15 continue in this suit.

16 I would cite for the court the *It's a 10, Inc.* case,
17 718 F.Supp.2d at 332. The quote is, "In today's era of
18 photocopying, fax machines and Federal Express, the location of
19 documents is not a significant factor in the convenience
20 analysis."

21 Numerous witnesses: The MDA is here. Mr. Swoope and
22 Governor Barbour despite their claims to the contrary will be
23 here as well as many other witnesses that are in Mississippi
24 that will testify and I believe in favor of our claims in this
25 suit.

1 There are other factors in the *Marrone* case. The
2 movants failed to offer any evidence detailing why litigating
3 in Mississippi would be unduly burdensome. Here we've heard no
4 evidence whatsoever, evidence, that litigating here for any of
5 these defendants would be more burdensome than litigating in
6 Delaware or anywhere else. The claims in *Marrone* were
7 non-core. The claims here are non-core. And, finally, as I
8 mentioned earlier, no jury trial could be granted by the
9 bankruptcy court. So it was a factor along with those other
10 factors. That's why we cited *Marrone*.

11 In the *Cytodyn* case the court heavily relied on four
12 factors in denying transfer. The witnesses, documents and
13 underlying events bore little relationship to the proposed
14 transferee forum. Same here. There is virtually no
15 relationship with Delaware between the witnesses, documents and
16 underlying events.

17 California law governed the claims. Here, too,
18 Mississippi law governs the claims. Many of the events
19 underlying the complaint, which was for fraud in the *Cytodyn*
20 case, occurred in California. Here many of the events which
21 underlie our fraud case occurred in Mississippi. And the
22 plaintiff could not obtain a jury trial in the bankruptcy case,
23 as is true here.

24 In *Luciano*, the district court denied the transfer
25 explaining two main reasons. Number one, transfer -- and I

1 will quote -- would be far afield from the notion of judicial
2 economy, particularly in light of the fact that the bankruptcy
3 court would have to submit its findings of fact and conclusions
4 of law to this court for de novo review. So too is the case
5 here.

6 Secondly, the district court noted that transfer would
7 be inefficient, open quote, because any fact finding here must
8 be by a jury sitting before an Article III judge. So too here.
9 The bankruptcy court cannot grant a jury trial.

10 We cited those cases because each of those
11 circumstances that I just set forth in addition to the
12 bankruptcy court's inability to grant a jury trial was present.

13 I could go into other matters of rebutting the various
14 points raised. The one that I most want to emphasize is that
15 they bear the burden of proof with evidence. And, your Honor,
16 they've given you no evidence that there are duplicative claims
17 here, overlapping litigation, that there's any collateral
18 estoppel, res judicata or other issues presented in this case.

19 To the contrary, we have given you evidence. We've
20 given you the stipulation that expressly says there's been no
21 adjudication of the merits of this case and that the
22 stipulation had no impact whatsoever on the claims in this
23 case, and that if they want to come forward and say there's
24 overlapping litigation and those various risks, they have a
25 burden of proving it. They can't just argue it.

1 THE COURT: All right. Thank you. Mr. Brabec.

2 MR. BRABEC: Yes, your Honor.

3 THE COURT: Your arguments are principally attacked on
4 this notion of evidence. So I'll let you make a response to
5 that.

6 MR. BRABEC: Yes, your Honor. Mr. Quin in talking
7 about the *Capmark* case and he quoted the *Capmark* case talking
8 about whether the presumption would apply. And, true, the
9 *Capmark* case did use the term "confirmation" in its statement.
10 However, that language was dicta. And the reason it was dicta,
11 your Honor, is found on page two of the opinion.

12 On September 30th, 2011, *Capmark* emerged from
13 bankruptcy. On October 24th, 2011, the plaintiffs commenced
14 the present action. So, your Honor, this is a -- a
15 post-emergence case, not a post-confirmation case. And any
16 language to the contrary in that case is merely dicta.

17 There is sufficient evidence, your Honor, before the
18 court in the form of the pleadings that have been filed from
19 the bankruptcy court, in the form of the concessions that were
20 made by Mr. Quin in argument concerning what happened in the
21 bankruptcy court, because he does have personal knowledge and
22 has, in effect, made himself a witness; but there is a
23 considerable amount that was done in that case by the State
24 relating to this MOU which was the crux of the entire
25 bankruptcy claim and it is the crux of this lawsuit.

1 They took discovery on facts that relate to this
2 lawsuit. They obtained documents relating to this lawsuit.
3 And for them to claim that it's unfair at this point in time to
4 make them go back and let the bankruptcy court merely decide
5 whether or not this case is appropriate in federal court is
6 really pushing the envelope given the fact that they were so
7 involved.

8 As Mr. Minor correctly pointed out, they filed a
9 motion to file a derivative claim on behalf of KiOR against my
10 clients. They wanted to pursue it in the name of the company.

11 Now, this -- as we indicated -- now, I didn't talk
12 about it this morning, but we talked about it a good bit
13 Thursday a week ago. There is a considerable concern about the
14 effect this lawsuit will have on the ability of them to fulfill
15 the plan because, as Mr. Quin admitted, there is only a limited
16 amount of insurance here and their claim's way in excess of the
17 amount of the insurance.

18 If that happens and insurance doesn't cover the
19 claims, KiOR is -- my client's going to look to KiOR for
20 indemnity. That's an issue that the bankruptcy court needs to
21 take into account because the bankruptcy court has an interest
22 in making sure that that plan succeeds.

23 Your Honor, we believe there's more than sufficient
24 evidence when you add it -- add it to the presumption -- the
25 home court presumption; and, therefore, we would ask that the

1 action be transferred.

2 MR. MINOR: Very briefly, your Honor. In response to
3 the statement that we came forward with no evidence, that's
4 simply not true. The evidence is there's a subordinated claim
5 filed by the State in that bankruptcy proceeding. The evidence
6 is they filed 60 documents in that proceeding. Unless Mr. Quin
7 is going to represent to the court that he's been hired by the
8 State to pursue some claim unrelated to the MOU, then it's
9 obvious that the issues are related. That's why Mr. Quin has
10 the knowledge that he has.

11 The motions that were filed were all an attempt by the
12 attorney general to recover money based on the claims set forth
13 in this complaint based on the MOU. It's true I haven't come
14 here with a bunch of documents for the court. But, your Honor,
15 I could have certainly printed out all of the documents from
16 the bankruptcy proceeding and I could have summarized the
17 deposition testimony.

18 But the only issue that's there or the only reason why
19 they were there, your Honor, was because, as I said earlier,
20 they tried to get money back based on the investment fraud
21 theory in the complaint at the bankruptcy proceeding. Then
22 they tried to preserve their ability to do so outside of that
23 proceeding. And to sit here and say that that's completely
24 unrelated is simply not true.

25 The evidence is that they're related. The evidence is

1 obvious based on the fact that the lawyers are the same, based
2 on the fact that the MOU is a part of the record in that
3 particular proceeding, based on the fact that your Honor has
4 heard no other reason why these attorneys would be interested
5 in a bankruptcy proceeding in the state of Delaware.

6 And I submit to your Honor that even though I don't
7 physically have them in front of me, the fact that there are 12
8 depositions that they participated in, the fact that there's
9 six hearings that have transcripts where they questioned
10 witnesses, the fact that they filed several motions including
11 motions that would only be filed for the purpose of trying to
12 recover money based on the same theory that we're here on today
13 is evidence.

14 And, your Honor, finally, Mr. Quin's argument in a way
15 makes my argument, because you're being asked to make a
16 decision based on lawyers' characterizations of what took place
17 in a proceeding that there is a judge who is intimately aware
18 of and who has presided over that proceeding for months.

19 And to sit here and ask your Honor to take all of
20 these factors and all of the 40 or 50 cases and all of the
21 lawyer argument about which factors in which case make more
22 sense and which factors did the judge base the decision on,
23 your Honor, we believe that it just simply makes more sense to
24 let the judge who's had the case make that decision.

25 And if that judge says they're not related, then

1 they're not related. If that judge says they're not going to
2 impact the plan or the estate, then it won't impact the estate.
3 If that judge says that there's no jurisdiction and it should
4 be remanded, so be it.

5 But the issue is there is a court where these -- this
6 party has been actively involved for several months. And that
7 court has more information about both the relationship between
8 this proceeding and that proceeding and how this lawsuit could
9 affect that litigation than anybody in this courtroom who's not
10 interested as an advocate on behalf of a party.

11 So, your Honor, I believe it's evident. I only have a
12 legal pad with me, but there's extensive documentary evidence
13 of the State's involvement in that bankruptcy proceeding.

14 THE COURT: All right. Thank you. Thank you all for
15 the arguments. I start a trial in another case this afternoon,
16 and that case is supposed to go the balance of the week.

17 As soon as I finish that, then I'll have another
18 status conference with you all where, hopefully, I'll be able
19 to tell you how I'm looking at the motion to transfer and then
20 what will be the further course of the lawsuit. So I'll be in
21 contact with you when I finish this lawsuit that I'm starting
22 this afternoon. Thank you all so much.

23 (PROCEEDINGS CONCLUDED)
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25

1 CERTIFICATE OF REPORTER
2

3 I, MARY VIRGINIA "Gina" MORRIS, Official Court
4 Reporter, United States District Court, Southern District of
5 Mississippi, do hereby certify that the above and foregoing
6 pages contain a full, true and correct transcript of the
7 proceedings had in the aforementioned case at the time and
8 place indicated, which proceedings were recorded by me to
9 the best of my skill and ability.

10 I certify that the transcript fees and format
11 comply with those prescribed by the Court and Judicial
12 Conference of the United States.

13 This the 23rd day of November, 2015.

14
15 s/ Gina Morris
16 U.S. DISTRICT COURT REPORTER
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